



DATE: April 13, 1998

CASE NO. 96-INA-105

In the Matter of:

TRATTORIA SAMBUCA FAMILY STYLE RESTAURANT,
Employer,

on behalf of

LUIS ALBINO AMON,
Alien.

Appearance: Adela Ivan
for Employer and Alien

Before: Burke, Wood and Vittone
Administrative Law Judges

DECISION AND ORDER

Per Curiam: This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A) and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On June 22, 1994, Employer, Trattoria Sambuca Family Style Restaurant, filed an application for alien employment certification on behalf of the Alien, Luis Amon, to fill the position of Cook (Italian Style). Minimum requirements for the position were listed as a 7th grade education and two years experience in the job offered. (AF 7-8).

By letter dated January 25, 1995, Employer was referred three applicants in response to its recruitment efforts and instructed to contact each of the applicants "within 2 weeks". (AF 16).

Employer rejected all three applicants for the position; one, Employer stated, "because he is not a resident, has no social security number"; a second, because "he is only qualified as a food runner"; and a third, because he "has been unreachable, I have called him several times. I also wrote to him letting him know I would like to meet him." (AF 21-32).

A Notice of Findings, (NOF), was issued by the Certifying Officer (CO) on August 29, 1995, proposing to deny labor certification based upon Employer's failure to adequately document lawful job-related reasons for the rejection of U.S. applicant Robert Perretti. Noting that applicant Perretti demonstrated more than two years qualifying experience, the CO found Employer's rejection of the applicant on the basis that he was "unreachable" insufficient. The CO advised:

Per employer's note dated 2/13/95, she made several attempts to reach applicant by telephone to no avail. Employer adds that she wrote applicant with no response. Employer did not submit a copy of the letter she sent applicant along with evidence of mailing. Absent such evidence it is held that employer has not adequate[ly] documented that applicant was rejected solely for lawful job-related reasons nor has employer demonstrated that she exhausted all available remedies in her attempt to recruit a qualified U.S. worker for this position. (AF 39-41).

In rebuttal, Employer submitted copies of a letter dated February 24, 1995, addressed to applicant Perretti, along with a certified mail receipt and indicated that the applicant failed to respond. (AF 42-44).

A Final Determination denying labor certification was issued by the CO on October 5, 1995. In denying certification, the CO concluded:

The 30-day recruitment period started on January 3, 1995 and ended on February 2, 1995. The recruitment period was not extended. Mr. Perretti's resume was forwarded to employer on January 25, 1995 with instructions that applicant be contacted within two (2) weeks. While employer's note dated 2/13/95 which was attached to applicant's resume evidences that timely attempts were made to contact applicant telephonically, to no avail, under cover of letter dated 2/13/95 directed to the State Office representative, employer forwarded resumes with recruitment results. It appears unlikely that two weeks after submitting recruitment report demonstrating inability to contact applicant by telephone, employer would have attempted contact by mail. However, allowing that employer proceeded in such manner, it is held that attempt to contact applicant in writing a month after his resume was forwarded and after the expiration of the 30-day recruitment period is not evidence of timely recruitment. (AF 45-46).

Employer timely requested review and reconsideration of the Denial Determination by letter dated October 21, 1995. In support thereof, Employer submitted a copy of a letter dated February 13, Employer states she wrote and mailed to Mr. Perretti by certified postage on

February 14th. Employer maintains she could not find this letter at the time of the previous request and believed, at the advice of her representative, that the follow-up letter of February 24th would be sufficient. (AF 60-61).

Employer's Request for Reconsideration was denied by letter dated September 27, 1995 and the matter was thereafter referred to this Office for review. (AF 62).

DISCUSSION AND CONCLUSION

In seeking alien employment certification, pursuant to 20 C.F.R. 656.21(b)(6), if U.S. workers have applied for the job opportunity for which labor certification is being sought, an employer must show that the U.S. applicants were rejected solely for lawful job-related reasons. Section 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. worker. Pursuant to 20 C.F.R. §656.24(b)(2)(ii), the CO shall consider a U.S. worker able and qualified for the job if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed.

Implicit in the application process is a good faith effort in the recruitment of U.S. workers. Actions by the employer which indicate a lack of a good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. H.C. LaMarche Enterprises, Inc., 87-INA-607 (Oct. 27, 1988). In such circumstances, the employer has not proven that there are not sufficient United States workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. §656.1.

Accordingly, an employer must contact potentially qualified U.S. applicants as soon as possible after it receives resumes or applications, so that the applicants will know that the job is clearly open to them. Loma Linda Foods, Inc., 89-INA-289 (Nov. 26, 1991) (*en banc*). Moreover, the Board has repeatedly held that reasonable efforts to contact qualified U.S. applicants may, in some circumstances, require more than a single type of attempted contact. See Jerry's Bagels, 93-INA-461 (Jun. 13, 1994) (employer failed to follow-up unsuccessful telephone contact made to applicant with a letter); L.G. Manufacturing, Inc., 90-INA-586 (Feb. 5, 1992) (attempted contact by telephone three times but failed to mail any interview letters); Gambino's Restaurant, 90-INA-320 (Sept. 17, 1991) (should have attempted mail promptly after phone calls were unsuccessful).

In the instant case, while Employer apparently attempted alternative contact with the applicant sometime after its unsuccessful telephonic attempts, the record is less than clear as to when the effort at contact was actually made. While Employer's note of 2/13/95 makes mention of a follow-up letter, curiously, no further reference was made and no copy of the letter was submitted until after issuance of the Final Determination. Notably, Employer's rebuttal does not assert an attempt at contact twice by mail, as is later alleged (i.e. certified receipts of February 14 and 24), despite the fact that this was the sole issue raised and clearly it would have been in

Employer's best interests to do so. The burden of proof is on Employer in an alien labor certification. 20 C.F.R. 656.2, Universal Diesel Services, 94-INA-250 (Oct 4, 1995). As presented, we find Employer's evidence unpersuasive and conclude that Employer has not adequately documented a timely effort at alternative contact once phone calls proved unsuccessful. Accordingly, it is determined that labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of panel:

Todd R. Smyth,
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.